

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

MAY 27 2003

In the Matter of)
)
 Amendment of Section 73.202(b))
 Table of Allotments,)
 FM Broadcast Stations.)
 (Ashland, Coaling, Cordova, Decatur, Dora)
 Hackleburg, Hobson City, Holly Pond,)
 Midfield, Sylacauga, and Tuscaloosa,)
 Alabama, and Atlanta, Georgia))

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

MB Docket No. 03-77
 RM- 10660

To: Assistant Chief, Audio Division
 Media Bureau

REPLY COMMENTS
OF COX RADIO, INC. AND CXR HOLDINGS, INC.

Cox Radio, Inc. and its wholly owned subsidiary CXR Holdings, Inc. (collectively "Cox"), by their attorneys, hereby respectfully submit these Reply Comments pursuant to the Commission's *Notice of Proposed Rulemaking* ("Notice") in the above-captioned proceeding to amend the FM Table of Allotments.¹ The *Notice* proposed to amend the FM Table of Allotments as requested in Cox's *Petition for Rule Making* dated March 18, 2002, as amended on November 27, 2002 (the "*Petition*"). On May 12, 2003, Cox filed comments confirming its continuing interest in the proposal set forth in the *Notice* and reiterating the public interest benefits that would result from grant of the proposal. The only other parties to file comments in the

¹ Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Ashland, Coaling, Cordova, Decatur, Dora, Hackleburg, Hobson City, Holly Pond, Midfield, Sylacauga and Tuscaloosa, Alabama, and Atlanta, Georgia), *Notice of Proposed Rule Making*, DA 03-816, MB Docket No. 03-77, RM-10660 (rel. Mar. 21, 2003) ("Notice").

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proceeding were KEA Radio Inc. (“KRI”) and Pulaski Broadcasting, Inc. (“PBI”), which jointly filed Comments and Counterproposal dated May 9, 2003 (the “KRI and PBI Counterproposal”).

By these reply comments,² Cox opposes the KRI and PBI Counterproposal because it violates the city grade coverage and line-of-sight requirements of Sections 73.315(a) and 73.315(b) of the Commission’s rules. KRI and PBI also fail to provide a Tuck analysis to demonstrate that Killen is independent of the Florence, Alabama urbanized area and merits a first local service preference. Cox therefore urges the Commission to deny the KRI and PBI Counterproposal as technically deficient and contrary to the public interest.

I. THE COMMISSION MUST DENY THE KRI AND PBI COUNTERPROPOSAL AS TECHNICALLY DEFICIENT AND CONTRARY TO THE PUBLIC INTEREST.

In its filing, KRI and PBI propose to upgrade Channel 252A to 252C3 at Scottsboro, Alabama for use by WKEA(FM) and, to accommodate the WKEA(FM) upgrade, propose to reallocate and reclassify Channel 252A from Pulaski, Tennessee to Killen, Alabama as Channel 252C3 for use by WKSJ-FM. The KRI and PBI Counterproposal must be dismissed because the proposed WKEA(FM) facilities at Scottsboro fail to encompass the community of license with a city grade signal and fail to provide line-of-sight to the community, as required by the Commission’s Rules.

A. The Proposed Channel 252C3 Allotment at Scottsboro Violates the Commission’s City Grade Coverage Requirement.

The Commission must reject the KRI and PBI Counterproposal as technically deficient because the proposed Channel 252C3 allotment at the specified reference coordinates would

² Cox reserves the right to file additional comments if the Commission issues a Public Notice for the KRI and PBI Counterproposal filed in this proceeding.

violate the Commission's Rules requiring city grade coverage of the entire community of license.³ As illustrated in the attached Technical Exhibit, both using uniform terrain and the actual height above average terrains for thirty-six equally spaced radials, the 70 dBu contour of the proposed allotment for Scottsboro fails to encompass the entire community of Scottsboro.⁴

Section 73.315(a) of the Commission's rules requires a station to provide a minimum field strength of 70 dBu over the entire principal community to be served.⁵ In rulemaking proceedings, the Commission utilizes a presumption of uniform terrain to calculate coverage of the proposed facilities, unless the proponent demonstrates "a reasonable assurance of the availability of the proposed tower site and FAA approval" (the *Woodstock* exception), in which case an actual terrain showing can be used.⁶ KRI and PBI claim to provide coverage to Scottsboro by using actual terrain, but did not provide a showing of reasonable assurance of an available tower site to justify deviation from the presumption of uniform terrain.⁷ Accordingly, uniform terrain must be utilized to evaluate the proposed facilities. Using uniform terrain, the 70dBu contour of the proposed allotment for Scottsboro is 1.5 kilometers shy of encompassing the community of Scottsboro.⁸ Moreover, even using actual height above average terrains for thirty-six equally-spaced radials, the 70 dBu contour of the proposed allotment for Scottsboro

³ See 47 C.F.R. § 73.315(a).

⁴ Exhibit A (Technical Exhibit of du Treil, Lundin & Rackley) ("Technical Exhibit").

⁵ See *id.*

⁶ See, e.g., *Brighton and Stowe, Vermont*, 16 FCC Rcd 8537, ¶ 3 (2001)(citing *Woodstock and Broadway, Virginia*, 3 FCC Rcd 6398 (1998)) ("*Brighton*"); *Meeker and Craig, Colorado*, 15 FCC Rcd 23858, ¶ 7 (2000).

⁷ See *Brighton* (finding that merely including a coverage map and a statement that FAA notification would not be required did not qualify for the *Woodstock* exception of a reasonable assurance of the availability of the proposed tower site and FAA approval).

⁸ Exhibit A (Technical Exhibit).

fails to encompass the community of Scottsboro.⁹ Accordingly, the KRI and PBI Counterproposal violates Section 73.315(a) of the Commission's Rules.

The Commission "require[s] strict compliance with Section 73.315(a) at the allotment stage."¹⁰ The Commission's longstanding policy is that counterproposals in FM allotment rule making proceedings must be "technically correct and substantially complete" at the time they are filed to provide all parties an opportunity to comment on the proposal in reply comments.¹¹ The Commission therefore does not allow parties to amend counterproposals.

The Commission has explained the underlying policy reasons for requiring strict compliance with its technical requirements:

[I]t continues to be our view that in order to maintain the technical integrity of the FM broadcast service, we should strictly adhere to our technical requirements at the allotment stage in order to increase the likelihood that the eventual authorization will comply with our technical requirements. In this vein, if we did not require strict compliance with our technical requirements at the allotment stage, the likelihood of the subsequent application not complying with these requirements would be far greater. Therefore, at the allotment stage, we consider and require a theoretical reference site at which we may determine that a transmitter could be located in compliance with all Commission technical requirements.¹²

The failure of the KRI and PBI Counterproposal to comply with the city grade coverage rule is fatal to the counterproposal.¹³ Specifically, if a counterproposal fails to comply with the

⁹ *Id.*

¹⁰ *Caldwell, College Station and Gause, Texas*, 15 FCC Rcd 3322, ¶ 13 (2000) ("Caldwell"); *affirmed sub nom Roy E. Henderson v. FCC*, 2001 U.S. App. Lexis 13901 (D.C. Cir. May 21, 2001).

¹¹ *See, e.g., Susquehanna and Hallstead, Pennsylvania*, 15 FCC Rcd 24160, n.2 (2000) ("Susquehanna"); *Eldorado and Lawton, Oklahoma*, 5 FCC Rcd 6737, ¶ 3 (1990) ("Eldorado").

¹² *Caldwell* at ¶ 14 (internal citations omitted).

¹³ *See Cloverdale, Montgomery and Warrior, Alabama*, 15 FCC Rcd 11050, ¶¶ 3, 6 (2000) (denying a counterproposal for failure to comply with Section 73.315(a)), *aff'd*, 12 FCC Rcd 2090 (2000)(denying petition for reconsideration); *Greenwood, Seneca, Aiken and Clemson*,
continued...

Commission's city grade coverage rule, the Commission will not accept the counterproposal for consideration.¹⁴ Accordingly, the KRI and PBI Counterproposal must be dismissed as technically deficient.

B. The Proposed Facilities at Scottsboro Will Violate The Commission's Line-Of-Sight Requirements.

The Commission also must deny KRI and PBI's Counterproposal because the proposed facilities at Scottsboro, Alabama, would contravene the line-of-sight requirements of Section 73.315(b) of the Commission's rules. Section 73.315(b) requires that the location of a station's transmitter "be so chosen that the line-of-sight can be obtained from the antenna over the principle city or cities to be served; in no event should there be a major obstruction in this path."¹⁵ The Commission has made clear that compliance with Section 73.315(b) is precluded where the obstruction is major and an antenna of sufficient height to overcome the obstruction is unrealistic.¹⁶ As specified in the attached Technical Exhibit, mountain ridges would obstruct the line-of-sight propagation path between the proposed Channel 252C3 reference site (assuming a 150 foot above ground level radiation center) and the city of Scottsboro.¹⁷ A proposed allotment

...continued

South Carolina, 3 FCC Rcd 4108, ¶ 2 (1988) (denying a counterproposal for failure to comply with Section 73.315(a)) ("*Greenwood*").

¹⁴ See, e.g., *Pacific Junction, Iowa*, 15 FCC Rcd 10756, n.1 (2000) (stating that the counterproposal was not placed on Public Notice because the counterproposal failed to comply with the city grade coverage criteria required in Section 73.315(a)); *Susquehanna*, 15 FCC Rcd 24160, n.2 (same); *Greenwood*, 3 FCC Rcd 4108 at ¶ 2 (stating that no comparison would be made between a counterproposal that violated the principal city coverage requirement and competing proposals).

¹⁵ 47 C.F.R. § 73.315(b).

¹⁶ See *Jefferson City, Cumberland Gap, Elizabethton, Tennessee, and Jonesville, Virginia*, 13 FCC Rcd 2303, 2306 (1998).

¹⁷ See Exhibit A (Technical Exhibit).

must be denied when the petitioner has failed to establish the existence of a site that can provide line-of-sight service to the entire community.¹⁸ As noted, in the allotment stage, the Commission requires strict compliance with the Commission's technical requirements.¹⁹ Thus, in addition to its failure to comply with the city grade coverage requirements, the KRI and PBI Counterproposal's violation of the line-of-sight requirements also renders the proposal technically deficient.

In light of the foregoing, the Commission should not place the KRI and PBI Counterproposal on Public Notice and should dismiss it without further consideration.

II. KRI AND PBI FAIL TO DEMONSTRATE THAT KILLEN IS INDEPENDENT OF THE FLORENCE URBANIZED AREA AND MERITS A FIRST LOCAL PREFERENCE.

The KRI and PBI Counterproposal proposes to reallocate and reclassify Channel 252A from Pulaski, Tennessee to Killen, Alabama as Channel 252C3 for use by WKSJ-FM. As demonstrated in the attached Technical Exhibit, the proposed facilities of WKSJ-FM at Killen, Alabama, would encompass 62% of the Florence, Alabama Urbanized Area with a 70 dBu signal.²⁰ If a community is located within an urbanized area or the proposed reallocation would cover 50% or more of an urbanized area with a 70 dBu signal, the Commission requires that the proponent provide a *Huntington and Faye and Richard Tuck* analysis ("Huntington/Tuck analysis") to determine whether the proposed community of license is independent of the

¹⁸ See *Jefferson City, Cumberland Gap, Elizabethton, Tennessee, and Jonesville, Virginia*, 10 FCC Rcd 12207, 12209 (1995), *recon. denied*, 13 FCC Rcd 2303 (1998); see also *Bald Knob and Clarendon, Arkansas*, 6 FCC Rcd 7435, 7436 (1991); *Creswell, Oregon*, 4 FCC Rcd 7040, 7041 (1989).

¹⁹ See *id.*

²⁰ Exhibit A (Technical Exhibit).

urbanized area and thus merits a first local service preference.²¹ Accordingly, KRI and PBI were required to provide a *Huntington/Tuck* analysis to demonstrate that Killen is independent of the Florence, Alabama, Urbanized Area, and thereby warrants a first local service preference.

In their Comments and Counterproposal, however, KRI and PBI failed to provide the requisite *Huntington/Tuck* analysis to demonstrate that Killen is independent of the Florence, Alabama, Urbanized Area. As noted, counterproposals in FM allotment rule making proceedings must be “technically correct and substantially complete” at the time they are filed,²² and therefore KRI and PBI may not amend their counterproposal to provide the requisite *Huntington/Tuck* analysis (or to remedy its technical deficiencies). Given that KRI and PBI failed to provide the requisite *Huntington/Tuck* analysis, the Commission must dismiss the counterproposal as incomplete and deficient.

²¹ See *Headland, Alabama and Chattahoochee, Florida*, 10 FCC Rcd 10352 (1995); *Faye and Richard Tuck*, 3 FCC Rcd 5374 at ¶¶ 1-4 (1988).

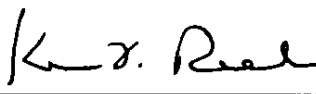
²² See, e.g., *Susquehanna, Eldorado*.

CONCLUSION

In contrast to the deficiencies of the KRI and PBI Counterproposal, the proposal set forth in the *Notice* and proposed by Cox's *Petition* complies with the Commission's technical requirements and would serve the public interest. Accordingly, in light of the foregoing, the Commission should dismiss the KRI and PBI Counterproposal and grant the proposal set forth in the *Notice* and requested in Cox's *Petition*.

Respectfully submitted,

COX RADIO, INC.
CXR HOLDINGS, INC.

By: 

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Dated: May 27, 2003

Exhibit A

Technical Exhibit
by du Treil, Lundin & Rackley, Inc.

TECHNICAL EXHIBIT
IN SUPPORT OF THE COMMENTS AGAINST THE
COUNTERPROPOSAL FILED IN MB DOCKET NO. 03-77

Technical Exhibit

This Technical Exhibit is prepared to address the Counterproposal filed in MB Docket No. 03-77 by Kea Radio, Inc. and Pulaski Broadcasting. As discussed in further detail below, there is a technical deficiency within this Counterproposal.

The Counterproposal proposes the following:

- Delete Channel 252A at Pulaski, Alabama and allot Channel 252C3 to Killen, Alabama.
- Substitute Channel 252C3 for Channel 252A at Scottsboro, Alabama.

This Counterproposal is only mutually exclusive with the following section of the Cox Petition for Rule Making:

- Delete Channel 238A at Ashland, Alabama and allot Channel 238A at Hobson City, Alabama.
- Delete Channel 252A at Sylacauga, Alabama and allot Channel 252A at Ashland, Alabama.

Proposed Channel 252C3 Scottsboro City Coverage Issue

The proposed Channel 252C3 Scottsboro allotment reference point does not provide the required 100 percent coverage to its principal community of Scottsboro as required during an allotment proceeding by Section 73.315(a) of the Commission's Rules. Figure 1 is a map showing the proposed allotment reference point of Channel

252C3 Scottsboro and the 2000 U.S. Census city limits of Scottsboro.¹ Shown is the 70 dBu coverage contour from the proposed Channel 252C3 allotment reference point using uniform terrain. Also shown is the 70 dBu coverage contours using the calculated individual radial height above average terrain (HAAT) based upon 36 and 360 equally-spaced radials.² As can be seen, none of these contours entirely encompass the community of Scottsboro. Therefore, the proposal is technically deficient both using the uniform terrain methodology and calculated using the actual height above average terrains for thirty-six equally-spaced radials.

The distance from the proposed Channel 252C3 allotment reference point to the furthest point of the Scottsboro city limits is 24.7 kilometers. Using uniform terrain, a Class C3 reference 70 dBu contour extends radially 23.2 kilometers. This calculates to the proposed Channel 252C3 allotment reference point 70 dBu contour being 1.5 kilometer shy of entirely encompassing the community of Scottsboro.

The proposed Channel 252C3 Scottsboro reference site also appears to suffer from terrain blockage from the allotment reference site into Scottsboro. Figure 3 is a series of terrain profiles showing that the line-of-sight propagation path from the allotment reference point into

¹ The Scottsboro city limits reported in the 2000 U.S. Census TIGER files were also confirmed by evaluating a map provided by the city's Emergency Services Department. Figure 2 is a map showing the Scottsboro city limits obtained from this department. By comparing the city limits between Figure 1 and Figure 2, it can be seen that they are in total agreement.

² Within the Counterproposal, the applicant states that when eight radials are used to calculate the proposed Channel 252C3 Scottsboro 70 dBu contour, the city of Scottsboro is "covered by the planned site." However, in issues of city coverage, the Commission typically employs additional radials, such as thirty-six, to ensure compliance with Section 73.315(a).

Scottsboro (assuming a 150 foot above ground level radiation center, which is the height for an assumed maximum Class C3 facility) is obstructed by the ridge of *Sand Mountain* and to a lesser extent, *July and Cotton Mountains*.

Proposed Channel 252C3 Killen, Alabama

The allotment reference point for the proposed Channel 252C3 operation at Killen will provide coverage to 83 square kilometers, or 62% of the Florence, AL urbanized area (134 km²).³ Figure 4 is a map showing the proposed allotment reference point of Channel 252C3 Killen and the 23.2 kilometer, uniform terrain Class C3 reference 70 dBu contour, along with the 2000 U.S. Census urbanized area for Florence.

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³ The Florence, AL urbanized areas were obtained from the 2000 U.S. Census TIGER files.

Figure 1

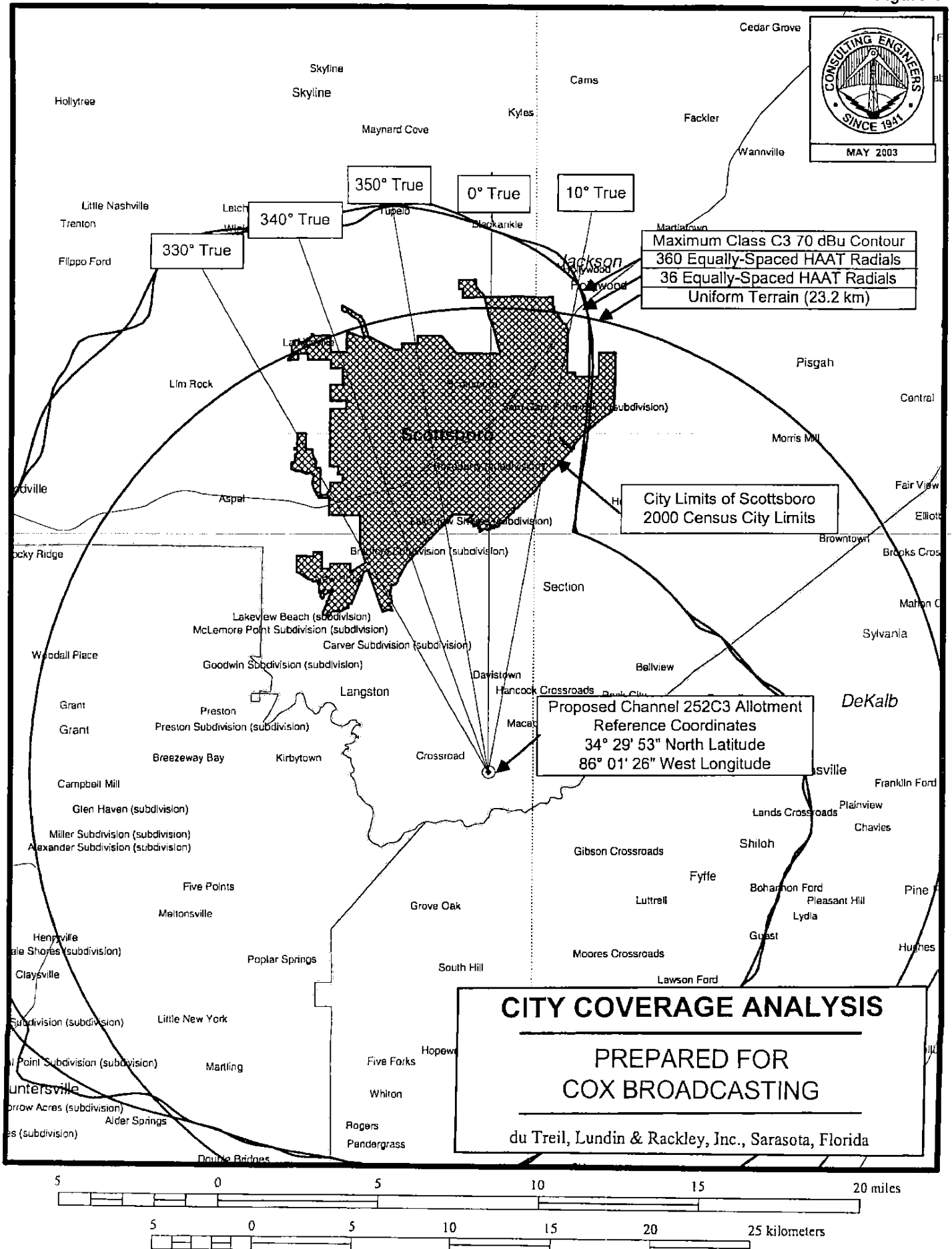


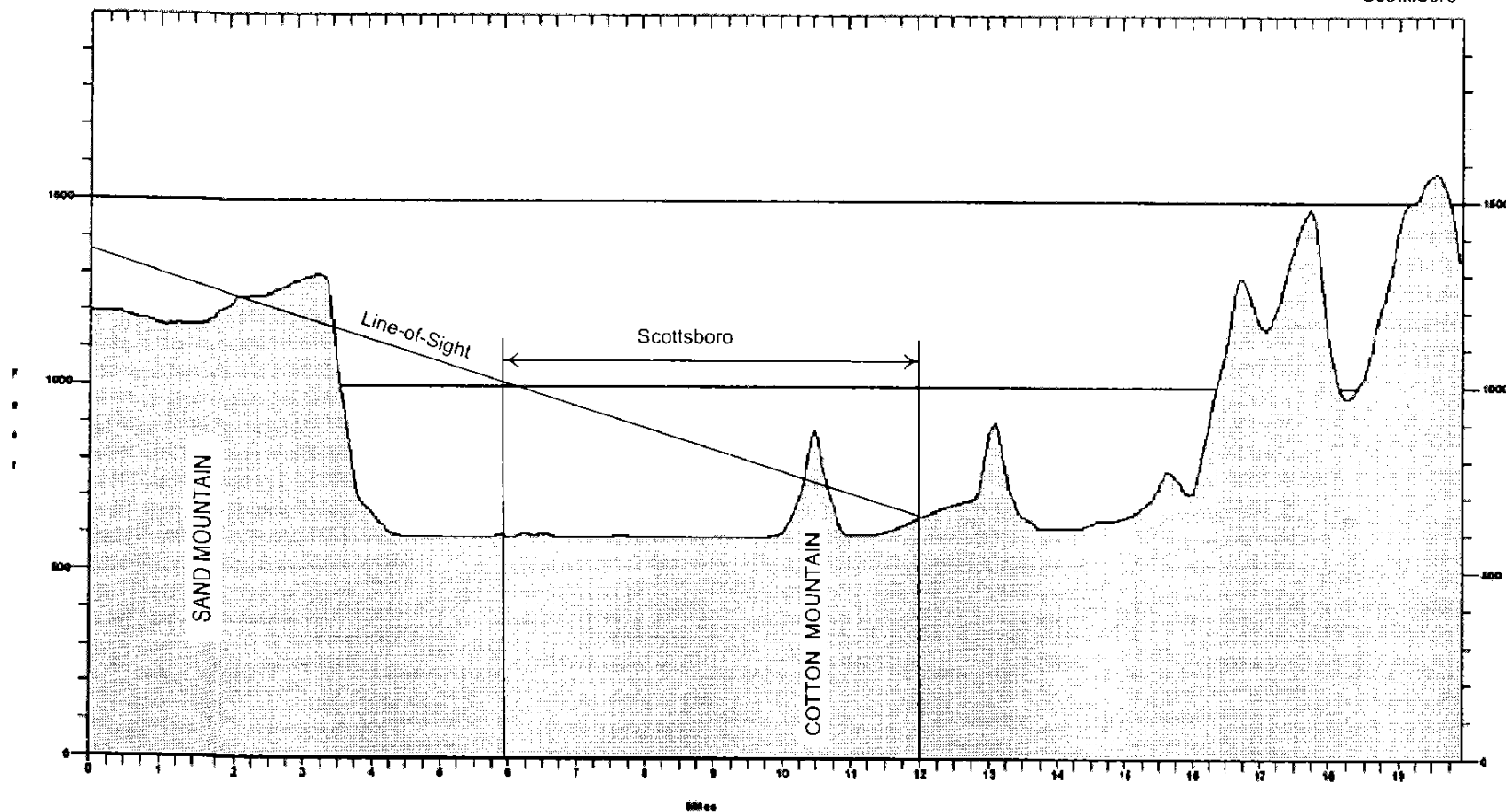
Figure 2



Figure 3
Sheet 1 of 5

Proposed reference Site:
34° 29' 53" N
86° 01' 26" W

Scottsboro

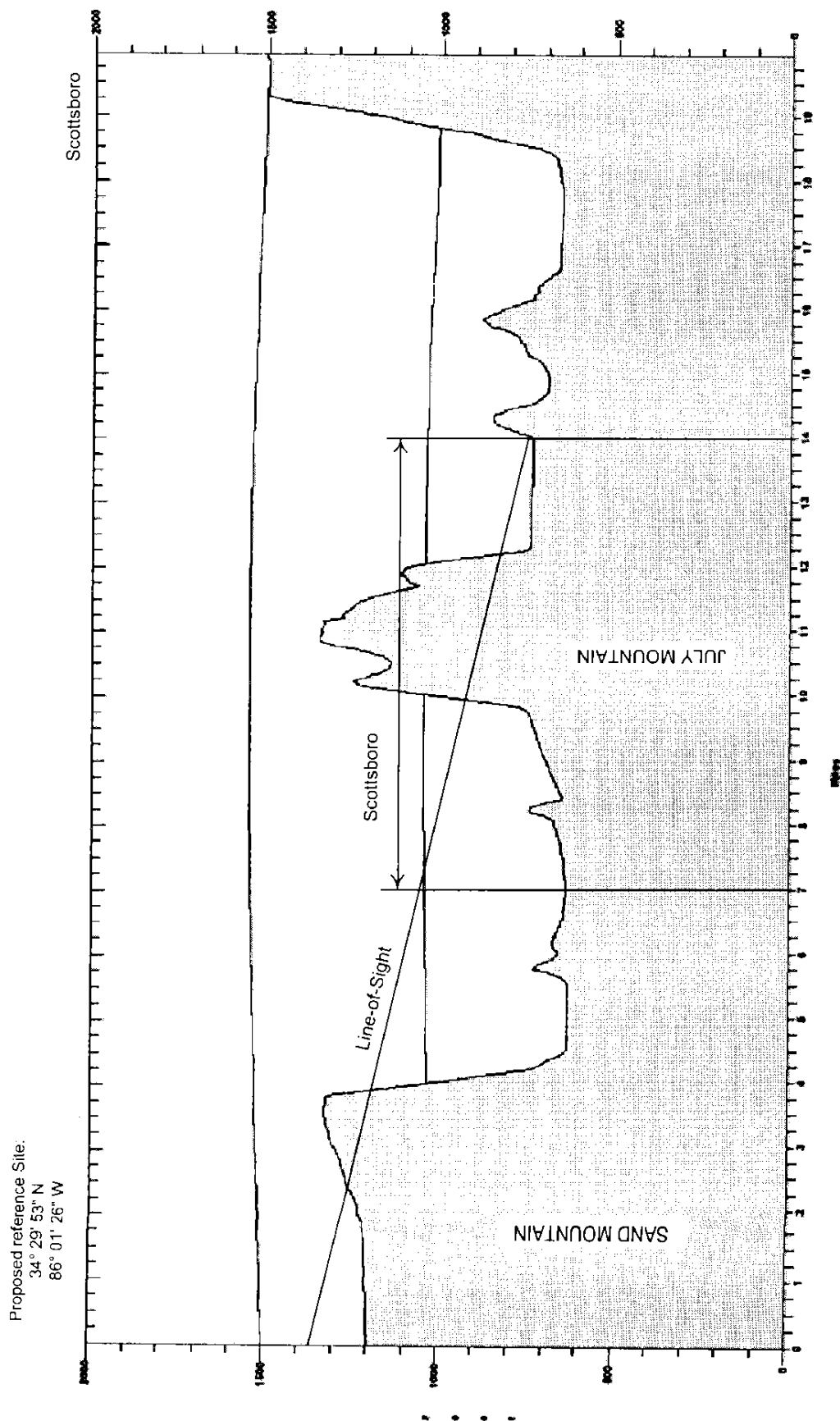


330° TERRAIN PROFILE TOWARD SCOTTSBORO

PREPARED FOR COX BROADCASTING

du Treil, Lundin & Rackley, Inc. Sarasota, Florida

Figure 3
Sheet 2 of 5

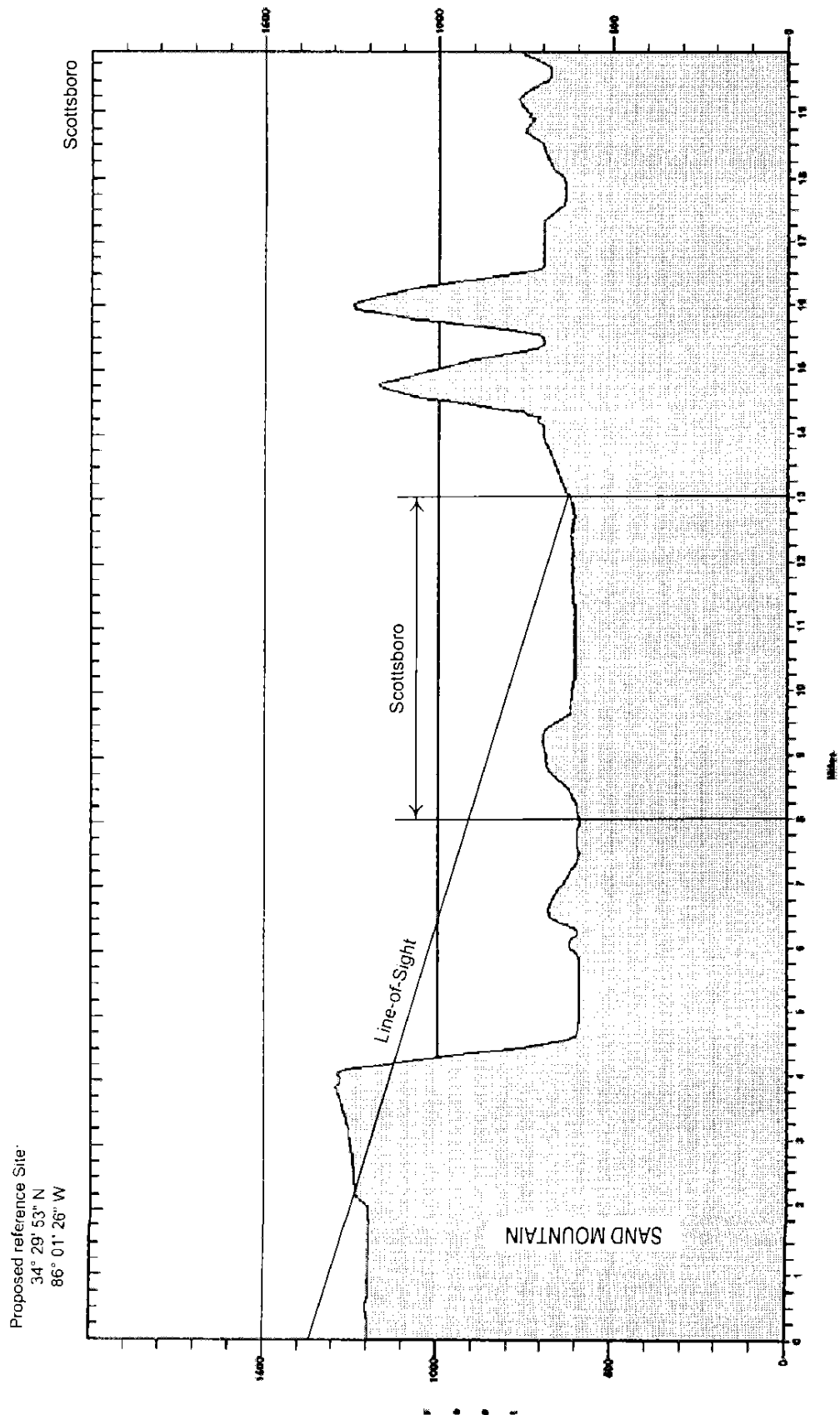


340° TERRAIN PROFILE TOWARD SCOTTSBORO

PREPARED FOR COX BROADCASTING

du Treil, Lundin & Rackley, Inc. Sarasota, Florida

Figure 3
Sheet 3 of 5



350° TERRAIN PROFILE TOWARD SCOTTSBORO

PREPARED FOR COX BROADCASTING

du Treil, Lundin & Rackley, Inc. Sarasota, Florida

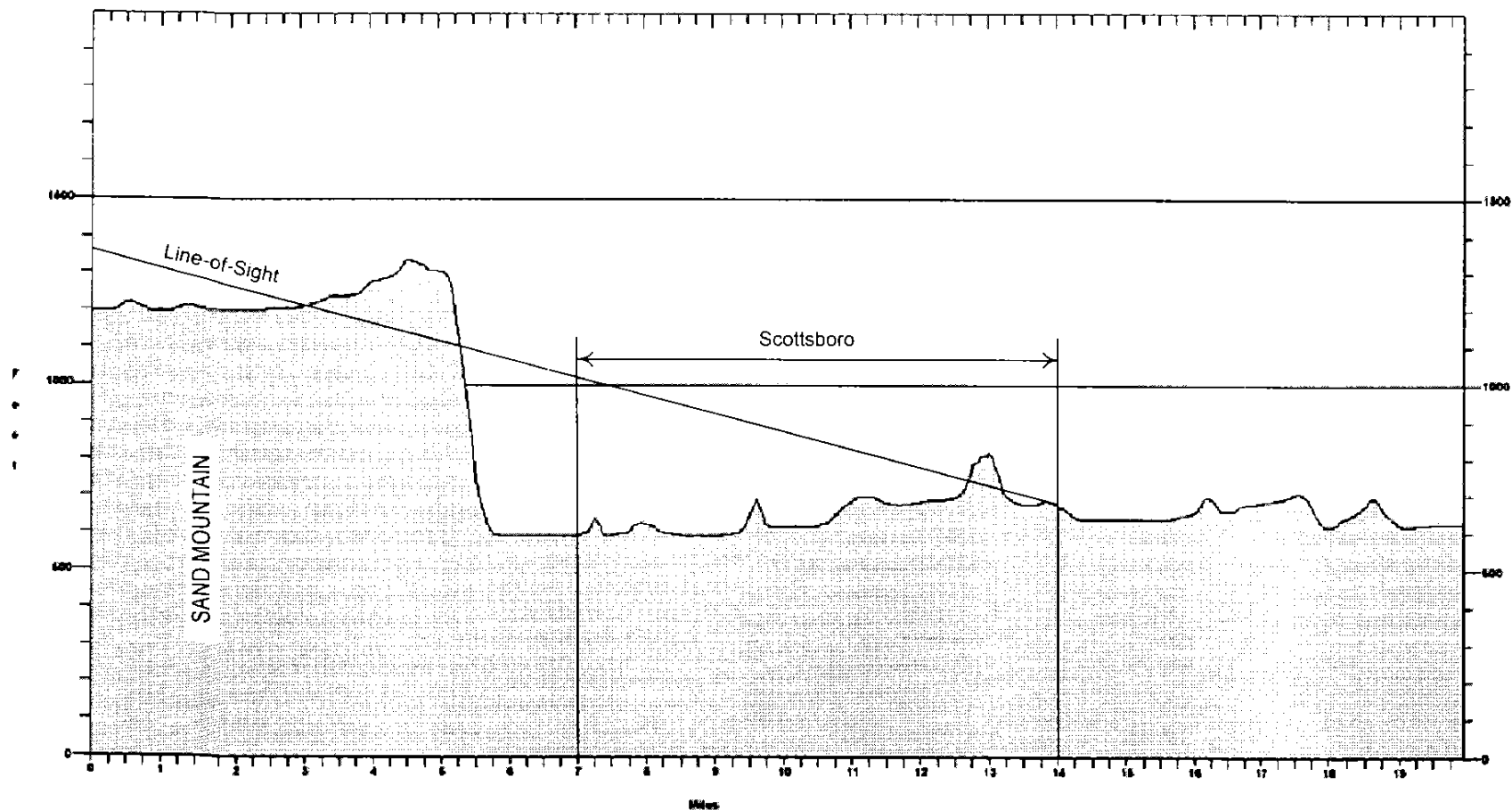
Figure 3
Sheet 4 of 5

Proposed reference Site.

34° 29' 53" N

86° 01' 26" W

Scottsboro

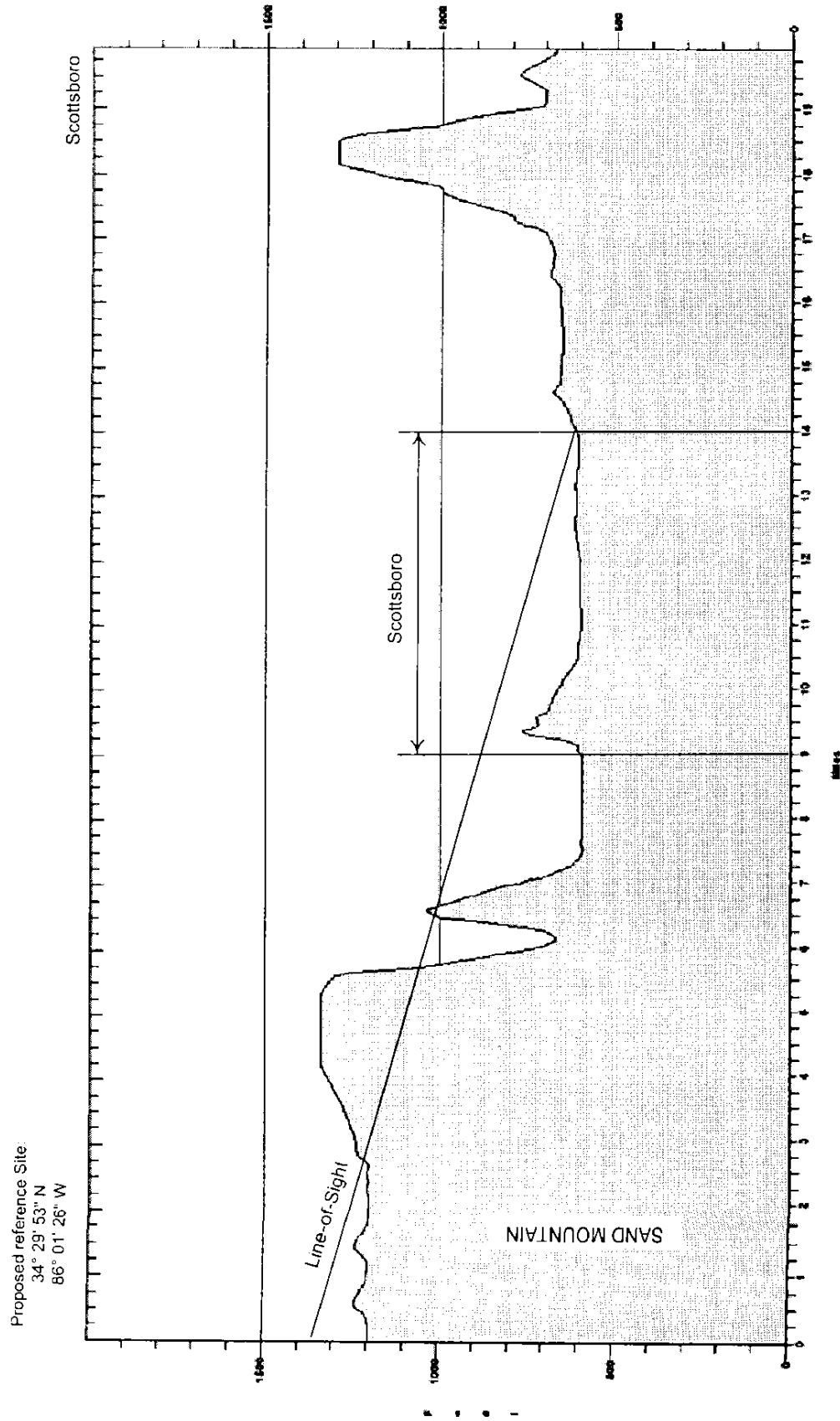


0° TERRAIN PROFILE TOWARD SCOTTSBORO

PREPARED FOR COX BROADCASTING

du Treil, Lundin & Rackley, Inc. Sarasota, Florida

Figure 3
Sheet 5 of 5



10° TERRAIN PROFILE TOWARD SCOTTSBORO

PREPARED FOR COX BROADCASTING

du Treil, Lundin & Rackley, Inc. Sarasota, Florida

CONSULTING ENGINEERS
SINCE 1941
MAY 2003

Florence, AL Urbanized Area

Proposed Channel 252C3 Allotment
Reference Coordinates
34° 58' 40" North Latitude
87° 36' 05" West Longitude

Maximum Class C3 70 dBu Contour based on uniform terrain (23.2 km)

Scale: 0 to 20 miles / 0 to 25 kilometers

PREPARED FOR
COX BROADCASTING

du Treil, Lundin & Rackley, Inc. Sarasota, Florida

CERTIFICATE OF SERVICE

I, Constance A. Randolph, a secretary at Dow, Lohnes & Albertson, PLLC, hereby certify that a true and correct copy of the foregoing "Reply Comments of Cox Radio, Inc. and CXR Holdings, Inc." was sent on this 27th day of May, 2003, via first-class United States mail, postage pre-paid, to the following:

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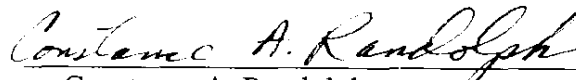
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* Denotes hand delivery


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